IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2476 OF 2003

Vinod Harikishan Gupta,
R/at 103, "B" Wing,
Royal Samrat, S.V. Road,
Goregaon (West), Bombay - 400 062. ... Petitioner

V/s

1. Minister for Revenue,
   State Government.
2. The Additional Commissioner
   For Revenue, Mumbai Division, Mumbai.
3. The Collector, Mumbai Suburban
   District.
4. Vimal Harikishan Gupta.
5. Sunil Harikishan Gupta,
(Sr.Nos.4 & 5 residing at-
103, "B" Wing, Royal Samrat,
S.V. Road, Goregaon (West),Mumbai-62. ... Respondents

Mr. Kishore Tembe for the petitioner.

Mr. Pradeep Jadhav, A.G.P. for Respondent Nos. 1 to 3.

Mrs. M.V. Gaikwad for respondent Nos. 4 and 5.

CORAM: DR. D.Y. CHANDRACHUD, J.

DATED: 20TH JULY, 2006

ORAL JUDGMENT:

1. Some time prior to the year 1944-45, a vast piece of Government land at village Chembur was converted into Suburban Scheme No.III by the State Government.

Individual plots of land were carved out as part of the Scheme and were granted to purchasers on identical terms and conditions. Plot No. 212 was granted by the Collector, Mumbai, in favour of Gajanand Manishankar Bhatt under an agreement dated 24th January, 1946 which came to be entered into in Form HH appended to the Maharashtra Land Revenue Rules, 1921. The original allottee sold and conveyed the plot of land to the father of the petitioner and the Forth and Fifth respondent to this proceeding. The land came to be duly transferred in the name of the transferee in the Revenue records and City Survey records. Some time in the year 1963-64 the City Survey was introduced in Greater Bombay and on recording the existing and subsisting rights in properties in the Bombay Suburban district, the City Survey office proceeded to issue Sanads to the holders of properties. All the holders of plots in Suburban Scheme III of village Chembur were issued Sanads in the prescribed form in terms which are stated to be identical. Though the petitioner has stated that he is not in a position to produce the original of the City Survey Sanad, a specimen in respect of land comprised of Plot 1105 of Chembur is annexed to the proceeding. On the death of his father, the petitioner became entitled to the plot in question together with the Fourth and

Fifth respondents in equal shares. By three separate Deeds of Conveyance dated 6th September, 1999, 4th November, 1999 and 31st January, 2000, the petitioner and the Fourth and Fifth respondents sold and conveyed their right title and interest in the plot of land and in the structures standing thereon in favour of Shri Avtarsingh K. Saini and Smt. Surinder Kaur A. Saini. An application was made to the City Survey office for transfer of the plot together with the structures standing thereon in favour of the purchasers.

2. At that stage, the petitioner and his brothers were served with a notice dated 30th March, 2001 issued by the Collector of Bombay Suburban District. The notice issued by the Collector records the material circumstances relating to the acquisition of the plot in question by the father of the petitioner. The notice recites that the land had been transferred to the original allottee under certain terms and conditions prescribed by the then Government of Bombay and that the provisions of the Bombay Land Revenue Code, 1879 together with Rules and Regulations for the time being in force would apply to the land in so far as they were not inconsistent with the conditions of the agreement. According to the Collector, Condition No.6 of the

prescribed form contained a stipulation to the effect that the original allottee, his heirs, executors, administrators and approved assignees shall not at any time transfer the said land or any portion thereof or any interest therein without the previous written sanction of the Government. The notice alleged that there was a breach of this condition.

3. The petitioner submitted a letter dated 21st April, 2001 to the 3rd respondent explaining that the agreement in Form HH did not contain any provision either regarding the tenure of the land or any condition about obtaining the previous sanction of the Government for transfer of the land. According to the petitioner, the City Survey record of the year 1963 erroneously mentioned for the first time the tenure of the land as B-1. According to the petitioner, the agreement of 24th January, 1946 in Form HH was a bilateral document which could not be unilaterally altered by Government on the basis of an erroneous entry in the City Survey Register Card.

4. A hearing took place before the 3rd respondent - the Collector. The Collector, by his order dated 17th July, 2001 rejected the contentions of the petitioner. The

Collector noted that the original order of grant or of the Sanad in Form HH was not available readily on the record, however, in the same Scheme No.III, a number of plots were granted by executing agreements in Form HH, copies of which were produced by the petitioner. The Collector proceeded on the basis that since the plot in question is from the same Suburban Scheme, the conditions of the Sanad in statutory Form HH would also be applicable to the present case. Having said that the Collector has stated that by a Government Resolution dated 21st November, 1957, a precedure has been laid down for regularizing illegal transfers by making a demand of 50% of the unearned income. Accordingly the Collector ordered regularization of the "illegal transfer" by the legal heirs of the vendor. The petitioner and the Fourth and Fifth respondents were called upon to pay an amount of Rs.75 lacs to the Government in accordance with the Resolution dated 21th November, 1957. The order of the Collector was confirmed in appeal by the Addl. Commissioner, Konkan Division, Bombay.

5. The petitioner carried the matter in appeal. Before the appellate authority, the original agreement in form HH came to be produced. The order of the appellate

authority dated 25th July, 2003 takes note of the fact that the agreement does not contain any restraint on transfer. Nonetheless, the appellate authority was of the view that a restraint on transfer was implicit in the allotment of land. This inference was drawn on the basis of the following circumstances, namely, that (1) The lands were initially allotted without any auction; (2) N.A. assessment was fixed in 1946 for a period of 50 years; (3) A concession was granted from the payment of stamp duty and registration charges; (4) The City Survey records of 1963 contain a reference to the occupancy of the petitioner as being in Class B-1. The order of the Minister of Revenue, acting as Appellate authority has been questioned in this proceeding under Art. 226 of the Constitution.

6. On behalf of the petitioner, it has been submitted that the allotment in the present case was governed by the Bombay Land Revenue Code, 1879 read with the Land Revenue Rules of 1921. Under Rule 43, the allotment was to be made under and in accordance with Form HH prescribed under the Rules. Form HH admittedly did not contain any restraint on transfer or alienation. In this case, the Appellate Authority has recorded that upon production of the original document, it was clear

that there was no restraint on alienation or transfer. That being the position, it was urged that it was not open to the Appellate Authority to read by implication, the existence of any restraint or condition on transfer without the prior permission of the State. On the other hand, on behalf of the State, the learned A.G.P. relied upon the provisions of Section 21 of the Maharashtra Land Revenue Code, 1966 for the purpose of submitting that the occupancy of the petitioner was in Class II and the petitioner must be regarded as subject to restrictions on the right of transfer.

7. The submissions which have been urged on behalf of the Petitioner must be evaluated in the context of the governing provisions of the Bombay Land Revenue Code, 1879 which held the field when the land was granted. Section 60 of the Bombay Land Revenue Code required the written permission of the Mamlatdar for taking up unoccupied land:

> "Any person desirous of taking up unoccupied land which has not been alienated must, previously to entering upon occupation obtain the permission in writing of the Mamlatdar."

Section 62 of the Bombay Land Revenue Code, 1879 empowered the Collector to grant unoccupied land on conditions:

> "It shall be lawful for the Collector subject to such rules as may from time to time be made by the State Government in this behalf, to require the payment of price for unalienated land or to sell the same by auction, and to annexe such conditions to the grant as he may deem fit, before permission to occupy is given under Section 60."

Section 68 then provides that,

> "An occupant is entitled to the use and occupation of his land for the period, if any, to which his tenure is limited, or if the period is unlimited, or a survey settlement has been extended to the land, in perpetuity conditionally on the payment of the amounts due on account of the land revenue for the same, according to the provisions of this Act, or of any rules made under this Act, or of any other law, for the time being in force, and on the fulfilment of any other terms or conditions

lawfully annexed to his tenure.

. Provided that nothing in this or any other section shall make it, or shall be deemed ever to have made it, unlawful for the Collector at any time to grant permission to any person to occupy any unalienated unoccupied land for such period and on such conditions as he may, subject to rules made by the State Government in this behalf, prescribe, and in any such case the occupancy shall, whether a survey settlement has been extended to the land or not, be held only for the period and subject to the conditions so prescribed."

Under Section 73 of the Bombay Land Revenue Code, 1879, an occupancy was deemed to be heritable and transferable, subject to such conditions as were lawfully annexed to the tenure:

"An occupancy shall, subject to the provisions contained in Section 56, and to any conditions lawfully annexed to the tenure and save as otherwise prescribed law, be deemed an heritable and transferable property."

8. In exercise of the powers conferred by the Bombay Land Revenue Code, 1879, the Government framed the Maharashtra Land Revenue Rules, 1921. Rule 42 provided that, unoccupied land required or suitable for building sites or other non-agricultural purpose shall ordinarily be sold after being laid out in suitable plots by auction to the highest bidder whenever the Collector is of opinion that there is a demand for land for any such purpose. However, the Collector was given the discretion to dispose of such land by private arrangement, either upon payment of a price fixed by him, or without charge, as he deemed fit. Sub-Rule (1) of Rule 43 then provided that, save in special cases in which the Collector with the sanction of the Provincial Government, otherwise directs, or in localities falling under Rule 44, land for building sites shall be granted in accordance with the provisions made thereunder. Clause (a) of Sub-Rule (1) provided that the land shall be granted in perpetuity subject to the provisions of the first paragraph of section 68, and shall be transferable. Sub-Rule 2 of Rule 43 is material for the purposes of the present case and it provides thus:

> **"Section 43(2):-** In the case of such grants an agreement in Form F or Form H, as the

> Collector may deem fit, shall ordinarily be taken from the person intending to become an occupant, and **in the case of land in development schemes undertaken by the Provincial Government in any district or in special cases, an agreement in Form HH shall be taken.** In the case of grants in which an agreement in Form H or Form HH is to be taken, the Collector may, subject to any general or special orders of the Commissioner, annex such additional conditions to, or omit, or vary such of the conditions in the agreement as he thinks fit." (emphasis supplied).

9. Sub-Rule (3) of Rule 43 stipulated that when the land is granted on an inalienable tenure, the clause specified in Form-I shall be added to the agreement.

10. Now, perusal of Form HH would show that no restraint is imposed in the conditions specified therein on the transfer of land. The conditions attached to an alienation on terms specified in Form HH specify that (i) The allottee will pay the land revenue lawfully due, as assessed from time to time (clause 1); (ii) The land would be used only for building purposes as specified in

Clause 3 (clause 2); and (iii) The provisions of the Bombay Land Revenue Code, 1879 and the Rules and orders for the time being in force thereunder shall apply to the occupant so far as same may be applicable and not in consistent with the conditions of the agreement. (clause 6). Form "I" of the forms which were appended to the Rules introduced a clause for inalienable tenure additional to forms "F" and "H" or other agreements. The condition in Form "I" was that the land has been granted subject to the condition that the legal heirs, executors, administrators and approved assigns may not at any time lease, mortgage, sell or otherwise howsoever encumber the said land or any portion thereof without the previous sanction in writing of the Collector.

11. Now it is necessary to reiterate that what Rule 43(2) stipulates was that, in the case of land in developed schemes undertaken by the Provincial Government in any District or in special cases, an agreement in Form HH shall be taken. It was open then to the Collector subject to the orders of the Commissioner to annexe additional conditions or to omit, or vary such of the conditions in the agreement as he thinks fit. However, when the land was granted on inalienable tenure, Sub-Rule (3) of Rule 43 prescribed that the clause specified in

Form-I shall be added to the agreement.

12. In the present case, the order passed by the Appellate authority clearly indicates that upon a perusal of the original agreement which was produced before the Authority it is evident that there was no restraint of any nature whatsoever on the transfer of the land. In the event the tenure was to be in alienable, the specific condition in Form "I" was required to be added to the agreement. That is not so in the present case.

13. In these circumstances, it is impossible to accept the contention that though the agreement entered into by the original allottee by the then Government of Bombay in 1946 does not stipulate any condition restraining alienation of the land or requiring permission of the government for the transfer of the land, nonetheless such a condition must be read by implication. The Appellate authority proceeds to read a restraint on alienation on the basis of four circumstances. Each of them can be considered now:

. (1) The land was allotted without an auction. In so far as this aspect is concerned, Rule 42 of the Land Revenue Rules, 1921 contemplated that unoccupied land

required or suitable for building sites or other non-agricultural purpose shall ordinarily be sold after being laid out in suitable plots by auction to the highest bidder whenever the Collector is of opinion that there is a demand for land. However, the legislature at the material time considered it appropriate in its wisdom to allow the Collector a discretion to dispose of land by private arrangement either at the price fixed by him or without charge as he deemed fit. Therefore, the Code of 1879 did permit the Collector to dispose of land without calling for an auction. From the circumstance that the Collector had under the Code of 1879 exercised his discretion to alienate land without auction, a restraint on the alienation of the land cannot be read by implication. (2) The appellate authority noted that N.A. assessment was fixed in 1946 for a period of 40 years. Under Rule 87(a) of the Land Revenue Rules, 1921 for the Bombay Suburban District, it was contemplated that, on account of the special conditions prevalent therein, the period for which the non-agricultural assessment would be fixed was ordinarily, 50 years. Hence, any restraint on alienation cannot be read by implication on the basis of this circumstance. (3) A reference was made by the Appellate authority to the City Survey record of 1963. In my view, it is not possible to accept the contention

that rights which crystalized under the Bombay Land Revenue Code 1879 and the Rules thereunder could be negated or disturbed by the City Survey record which was carried out after the new Code came in force in 1966. Section 336 of the Code, 1966 provides that the repeal of the Bombay Land Revenue Code, 1979 shall not affect any right, privilege, obligation or liability acquired or incurred under the law repealed. Under the second proviso rights acquired under the repealed enactment shall, in so far as is not in consistent with the provisions of the Code, be deemed to have been done or taken under the Code and shall continue to remain in force unless superseded by anything done or action taken under the Code.

14. On behalf of the State, the learned A.G.P. adverted to Section 29 of the Maharashtra Land Revenue Code, 1966 under which the classes of persons holding land of the State are categorized as - (a) Occupant - Class I, (b) Occupant - Class II and (c) Government lessees. Sub-Clause (a) of Clause (2) of Section 29 defines an Occupant Class I, as a holder of unalienated land in perpetuity and without any restrictions on the right to transfer. An Occupant Class II is defined in Clause (3) of Section 29, as a person who holds unalienated land in

perpetuity subject to restrictions on the right to transfer. In the present case on the record it stands, there is no restraint on the right of transfer.

15. The notice to show cause that was issued to the petitioner proceeded on the foundation that Condition 6 of Form HH under which the land is allotted to the original allottee stipulated that the allottee shall not transfer the land or any portion thereof without the previous written sanction of the Government. However, the order of the Appellate authority accepts that there is no condition in the grant restricting the exercise of the right of transfer by the original allottee. That being the position, the basis of the show cause notice issued to the petitioner was without foundation. On behalf of the petitioner, reliance was placed on a communication dated 8th January, 2002 addressed to the Chief Secretary of the Revenue & Forest Department by the Collector, Bombay Suburban District. A copy of the aforesaid communication is stated by Counsel for the Petitioner to have been received by the petitioner under the Right to Information Act. The communication addressed by the Collector specifically adverts to the fact that the agreements entered into in Form HH relating to almost 400 to 500 plots in Scheme III of Chembur did

not contain any restraint on alienation or transfer. However, the Collector has stated that a special drive had been initiated by the State Government to raise revenues and in pursuance thereof notices have been issued to the allottees or to the subsequent transferees for claiming 50% of the unearned income under Government’s Resolution dated 21st November, 1957.

16. In the circumstances for all these reasons, the orders passed by the authorities below are unsustainable. The petition will have to be allowed.

17. Rule is made absolute in terms of prayer clause (a). No order as to costs.

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